In the United States

Circuit Court of Appeals

for the Ninth Circuit

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,
Plaintiffs in Error
vs.
THE UNITED STATES OF
AMERICA,
Defendant in Error

No. 2517

PETITION FOR REHEARING.

F. C. ROBERTSON.
FRED MILLER,
Attorneys for Russell G. Belden.

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Comes now Russell G. Belden, plaintiff in error, and moves the court for a rehearing and that the decision and judgment rendered in the above entitled cause on the 26th day of May, 1915, be set aside and reversed, for the following reasons:

I.

Error in denying or overruling the exception and assignment challenging the sufficiency of the indictment and especially upon the question of failure of indictment to charge a conspiracy.

II.

Error in overruling assignment of error on refusal to grant defendants a separate trial.

III.

Error in holding there was no error in refusal of court to give an instructed verdict for defendant.

IV.

Error in not sustaining assignments based on question as to whether representations made by defendants were not merely expressions of opinion and not statements of a fact.

V.

Error in overruling assignments directed to court's instructions.

VI.

Error in not setting aside judgment of conviction.

ARGUMENT.

Defendant seems to have been peculiarly unfortunate in failing to impress upon the court the strength of the position which he takes relative to some of the important phases of his case.

We shall first address ourselves to the indictment. We contended in our brief and oral argument that it was necessary to charge a conspiracy. The opinion challenges this position and cites three cases to sustain its position. We shall endeavor to show that the authorities cited in the opinion do not sustain the opinion. It is first insisted that there is a difference between Sec. 215 P. C. and Sec. 5480 R. S. The only difference is that under the old statute they must have intended to use the mails. It does not change the law of conspiracy either as a substantive crime or rule of evidence. Stokes vs. U. S., 157 U. S. 187, is relied on to differentiate the old and recent statutes, but cannot be considered as an authority in this case, because the indictment charged the defendants with a conspiracy under Sec. 5440, to commit the offense de-

scribed by Sec. 5480 R. S. Sec. 5440 defines a conspiracy against the United States. The case of Wilson vs. U. S., 190 Fed. 427, was a case where the indictment was under Secs. 5480 and 5440.

The main question upon which we desire to direct the court's attention in this petition, is relative to the following from the opinion:

> "Nor is it essential in offering proof respecting the existence of a conspiracy with relation to a scheme to defraud, and the use of the mails in furtherance thereof, that such conspiracy be alleged in the indictment. It is a common thing to have the question arise whether one defendant is bound by the statements and acts of another, or of persons not even connected by indictment with the offense charged, and the constant ruling has been that, if there has been a joint contrivance, or joint participation, with a common purpose, the acts and statements of the one, while engaged in carrying into effect the common purpose, are evidence against the other, and this without the necessity of alleging conspiracy in the commission of the offense. Fitzpatrick vs. United States, 178 U. S. 304, is illustrative, etc."

We will refer briefly to the Fitzpatrick case. The defendants were jointly charged with the murder of Samuel Roberts, with a revolver, which the defendants had and held in their hands, etc. While we question the ability of a pleader to charge three men with murdering another with one revolver, yet

this one succeeded, and the sufficiency of the indictment, on that ground, was not questioned. Separate trials were granted. F. was convicted and sued out a writ of error to the Supreme Court of the United States. This case is cited by the distinguished Judge who wrote the opinion in this case, as authority that the statement of one defendant is admissible to fasten a crime on a co-defendant without either alleging or proving a conspiracy. Testimony as to alleged acts of co-defendant were admitted. Of this the court said:

> "Had the statement of Corbett, that he was shot, and inquiring for a doctor, tended in any way to connect Fitzpatrick with the murder, it would doubtless have been inadmissible against him upon the principle announced in Sparf vs. U. S., 156 U. S. 51, that statements made by one or two joint defendants in the absence of the other defendant, while admissible against the party making the statement, are inadmissible against the other party. In this case declarations of Hansen connecting Sparf with the homicide there involved, tending to prove the guilt of both, and made in the absence of Sparf, were held inadmissible against the latter. This is a familiar principle of the law; * * *."

We contend that two persons could not be charged jointly with using the mails to defraud without charging in the indictment a conspiracy and establishing it by the evidence. The motion

for a separate trial was denied because the government was evidently proceeding upon the theory of a conspiracy. The government never attempted to establish a conspiracy. Nevertheless, acts of one, remote from the other, were admitted as evidence of guilt. The court instructed fully upon the question of conspiracy, and told the jury what evidence was to be considered and what was not. We contended at the trial, and now, that there was not even a scintilla of evidence to establish a conspiracy. The writer of the opinion in this case disposed of our contention on appeal as follows:

> "It is not essential that it contain allegations of conspiracy, but it was altogether proper to charge the jury respecting the subject, if the evidence offered tended to show that a conspiracy really existed in relation to operations to defraud."

We will consider briefly whether there is any authority to sustain this position. We have shown that the cases cited in the opinion on the sufficiency of the information do not so hold.

> "When the fact of a conspiracy has been proved, * * * the acts and declarations of one co-conspirator in furtherance of, * * * are admissible in evidence against his associates." VI Enc. of Law, p. 866.

The evidence not being admissible until the con-

spiracy is established, we then must ascertain whether an element not charged in the indictment is admissible in evidence.

Mr. Elliot in his work on Evidence, Vol. 4, Sec. 2939, says:

> "The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted is, that, by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design, thus rendering whatever is done or said by any one, in furtherance of that design, a part of the *res gestae,* and, therefore, the act of all."

If an attempt is made to charge a conspiracy under 5440 it would not be contended but what a conspiracy must be charged. Nor why not if there is a conspiracy to commit any other crime? As a rule of evidence we have seen that a statement of one defendant out of the presence of another is inadmissible. It is made admissible if a conspiracy is established, and then only. It will doubtless be said that the defendants are not charged with conspiracy to commit this act, but with the act itself. The answer is that if they were not in a conspiracy they could not be joined, except where they aided or abetted. As was shown

in the original brief, they must allege who was the accessory.

State vs. Gifford, 19 Wash. 464.

State vs. Beebe, 66 Wash. 463.

These two cases hold that where one person is charged as a principal and co-defendant as accessory the statements and evidence against one were not admissible against the other. In the last case, a large number of authorities are cited. We fail to find any case in point from the Federal Courts, but it appears too plain for argument that what is charged is merely overt acts. It is not necessary to charge overt acts in an indictment for conspiracy, but to also include the offense which was the product of the conspiracy the acts must be stated. One could not conspire with himself. Anything one defendant says or does is admissible against him if it shows a motive or guilt. But anything any one else says is not admissible against him. That is the situation in this case. Two defendants are indicted. No charge of confederating together. As far as the indictment goes, they are each innocent of the other's acts, therefore, the acts or statements of one are not admissible against the other.

156 U. S. 51; 178 U. S. 304, *supra.*

This is not technical, for it goes to the very foundation of criminal pleading. The indictment did not advise the defendants what they were to meet or what they might expect. The rule of conspiracy is the genesis of the admission of the acts and statements of one defendant against the other and taking it out of the rule of *res gestae.* Certainly it is not fair to hold there is magic in this particular statute sufficient to modify an ancient rule of evidence.

CONSPIRACY NOT ESTABLISHED.

A reference to the exhibits in the case beginning on page 360 of transcript, will show the Int. Dev. Co. was incorporated in April, 1905; the Michel in Nov., 1905, and the Empire later. There is no evidence in the record preceding these organizations except the R. G. Belden Co., and there is no claim made as to its inception being fraudulent. All of the other evidence is subsequent, and relates to matters occurring afterwards. In other words, the government did not introduce any evidence showing any irregularities in the formation of either of the companies. The letters upon which the government relied were letters written mostly within the statute of limitation. These letters

were written some by one defendant, some by another. None of them antedated the date when the different corporations were formed. All at least, two to five years, afterwards. Plaintiff's Exhibit 32, pg. 367-8-9-70. Plaintiff's Exhibit 69, pg. 374, Jany. 3d, 1907. Plaintiff's Exhibit 70, pg. 379, Dec. 8, 1906. These letters and exhibits were chiefly between the defendants and different members of the corporations or had to do with individual sales or transactions. On page 336, the court instructed the jury that if the defendants "having devised a scheme to defraud, defendants with a view of * * *." It will be seen the court took the view that the government must establish its scheme, and we take it also its conspiracy, without recourse to the letters set out in the indictment. They of themselves were innocent enough and we fail to find anything in the entire record which would show any fraudulent scheme.

The government admitted there was a deposit of coal on the Crown. Defendant's experts testified that same veins were under the other two. Defendant requested an instruction on this subject. Assignment No. 33, p. 446. It was refused. Instead the court instructed, pg. 338:

"The defendants are not on trial for evolv-

ing or devising an improvident scheme, even though you should find their plan to be such, nor are they on trial for mere errors of judgment."

This court disposed of this assignment on the theory the court fully instructed upon the subject. This was the only instruction and we don't think related to this subject at all. It had to do more with the failure of their corporations than whether the coal veins were under these two claims. The Crown is admittedly a good mine, but it has not yet shipped any coal.

We have endeavored to be brief in the presentation of this petition. We have not reiterated the contentions made in the original brief relative to failure of indictment to directly charge any act, and being merely by way of recital. We call attention to pages 12 and 13 of brief and subsequent. Also to that portion of the brief wherein it is urged there could not be a crime proven, for all of defendant's experts had advised them that coal underlay the Michel and Empire.

On the facts we desire to again insist that nothing in the nature of a conspiracy was established, neither was the evidence of alleged fraudulent acts sufficient to sustain a conviction. The opinion disposes of the facts by a mere reference. If an

attempt were made to justify the conviction by a recital of the facts, it would be found, we apprehend, a very difficult task. As we view it, the government merely threw into the case a lot of exhibits, the product of defendants or their officers, having no relation to the counts in the indictment and called it a case.

We respectfully submit the defendant has not been legally convicted and is entitled to a rehearing.

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I, FRED MILLER, one of the attorneys for the above named plaintiff in error, hereby certify that in my judgment the above and foregoing petition for a re-hearing is well founded and that it is not interposed for delay.

Fred Miller